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United States District Court

Southern District of New York

MYRTLE H. MACOMBER,

PLAINTIFF,

AGAINST

MARK EISNER, AS COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE THIRD DISTRICT OF THE STATE OF NEW YORK,

DEFENDANT.

BRIEF FOR THE PLAINTIFF.

Statement of the Case.

The case is heard on complaint and demurrer. The action is brought to recover a tax collected under the Income Tax Law of 1916 on the ground that it was illegally assessed. The facts are fully set out in the complaint; briefly they are as follows:

On January 1st, 1916, the Standard Oil Company of California had capital stock issued and outstanding to the amount of $49,686,656. On that date the Company had surplus and undivided profits, which were invested in its plant, property and business required for

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the purposes of the Company, amounting to $44,852,-263.02. Of this sum $20,353,068.34 had been earned prior to March 1st, 1913, and the balance, $24,499,-194.68, subsequent to that date (fols. 3, 4, 5). On January 16th, 1916, the Directors declared a 'stock dividend' of $24,843,327.74, to be issued to the shareholders on a ratio of half a new share to one old share. Pursuant to this resolution all of the surplus earned before March 1st, 1913, was transferred from surplus account to capital stock account and sufficient of the remaining surplus to equal the balance of the par value of the new shares (fol. 7). As a result 18.0743 per cent. of the par value of the new shares represented earnings subsequent to March 1st, 1913 (fol. 12).

The plaintiff, owning 2,200 shares previous to January 1st, 1916, received 1,100 of these new shares (fol. 8). The defendant, acting under the authority of the Treasury Department and the Act of Congress of September 8th, 1916, levied a tax on the plaintiff as having received income of $19,877, being 18.07 per cent. of $110,000, the par value of the new shares (fols. 15, 16, 17, 18). The tax was paid under protest and appeal taken to the Commissioner of Internal Revenue, which appeal having been disallowed, plaintiff brought this action to recover the money so paid.

The complaint also states that prior to the closing of the books for the distribution of the 'stock dividend', sales of the Company's stock were made in the open market at prices ranging from $360 to $382 per share, and that subsequent thereto the prices ranged from $234 to $268 a share (fol. 10). These figures show that the market value of plaintiff's holdings was prac-

tically unchanged by the action of the directors, two of the parent shares being equivalent to three subsequent to the distribution.

The issue of law presented in this case is whether Congress has power to include in the amount for which an individual is liable under the Income Tax Law of 1916, the "cash value" of new shares which are received upon the declaration of a 'stock dividend'.

The complaint alleges that such a tax is in violation of Article I, Section 3, clause 3, and Article I, Section 9, clause 4, of the Constitution requiring that direct taxes be apportioned according to population, and that it is not included within the provisions of the Sixteenth Amendment permitting the taxation of "incomes" without apportionment.

The applicable parts of the Income Tax Law of 1916 are found in 39 Stat. 756, Ch. 463, Part I, Section 1 (*b*):

> "In addition to the income tax imposed by subdivision (*a*) of this Section (herein referred to as the Normal Tax) there shall be levied, assessed, collected and paid upon the total net income of every individual or in the case of a non-resident alien the total net income from all sources within the United States, an additional income tax. . . ."

Section 2 (*a*)

> "The net income of the taxable person shall include gains, profits and income derived from salaries, wages or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, busi-

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> nesses, trades, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in any real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever; *Provided,* that the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, joint-stock company, association or insurance company out of its earnings or profits, accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, joint-stock company, association, or insurance company, which stock dividend shall be considered income, to the amount of its cash value."

There was considerable doubt about the meaning of the term "cash value" which was interpreted by the collector to mean in the present case "par value". This is plainly an arbitrary figure, for the complaint admits that any share was worth from $234 to $268 subsequent to the readjustment.

The War Revenue Act of October 3, 1917, 40 Stat. 300, Ch. 63, Section 12, amends the above to read:

> "which stock dividends shall be considered income to the amount of the earnings or profits so distributed"

but this change of course does not affect the present case, which is concerned solely with income under the Act of 1916.

POINT I.

THE TAX IS SOUGHT TO BE LAID UPON THE PROPERTY IN QUESTION SOLELY BY REASON OF OWNERSHIP AND CANNOT BE SUSTAINED UNLESS IT IS AUTHORIZED BY THE SIXTEENTH AMENDMENT.

Before the Sixteenth Amendment there were two kinds of income with respect to taxability under the Federal Constitution.

(*a*) Gains and profits from "Business, privileges, employments, and vocations" whether of corporations or of individuals.

Pollock v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 637.

A tax upon such gains and profits was an excise subject to the constitutional requirement as to geographical uniformity.

Pollock v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 635;

Brushaber v. *Union Pacific R. R. Co.*, 240 U. S. 1.

Stanton v. *Baltic Mining Co.*, 240 U. S. 103.

The Corporation Tax Act of 1909 fell within this category.

Fint v. *Stone Tracy Co.*, 220 U. S. 107.

Stratton's Independence, Ltd., v. *Howbert*, 231 U. S. 399.

Doyle v. *Mitchell, Bros. Co.*, 247 U. S. 179, 182, 183.

Hays v. *Gauley Mountain Coal Co.*, 247 U. S. 189, 191, 192.

(*b*) Income from real or personal property, as such, taxed by reason of ownership.

A tax upon such income is not an excise, but a direct tax. The question involved in the *Pollock* case related to this sort of income, and it was held that as the tax was a direct tax, Congress had no constitutional power to impose it without the required apportionment among the States according to population (Const., Art. I, Secs. 2 and 9).

In the case at bar, we are concerned solely with this direct tax.

"Direct taxes", which are within the restriction of Article I, Secs. 2 and 9, include not only capitation taxes and taxes upon lands, houses, and other real property, but also all taxes on personal property or investments, including income from either real or personal property, taxed because of ownership. Taxes on investments in corporate stocks, laid directly because of ownership, are in this class.

Pollock v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 637.

The Sixteenth Amendment removed the requirement of apportionment only in the case of taxes on incomes. It provides:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

The history of this Amendment is well known. It was adopted for the purpose of avoiding the effect of

the decision in the *Pollock* case, and of permitting Congress to levy a tax on incomes without apportionment. Taxes on "income" from whatever source derived were thus placed in the same category and could be levied without apportionment, being subject in the same manner as excises to the constitutional requirement as to geographical uniformity.

Brushaber v. *Union Pacific R. R. Co.,* 240 U. S. pp. 18, 19.

The sole question, therefore, is: What is "income"?

There is nothing in the Sixteenth Amendment which authorizes Congress to levy, without apportionment, a tax on anything which does not come within the proper definition of "income". It was, obviously, not the intention to authorize Congress to levy a direct tax on property, except as to income, or otherwise to amend, to qualify, or in any way to restrict the requirements which have existed ever since our Constitution was adopted, that direct taxes on property can be levied by Congress only if properly apportioned among the States.

In some of the five cases involving questions under the Income Tax Section of the 1913 Tariff Law, reported in 240 U. S., pp. 1-26; 103-126, the limitations of Article I, Sections 2 and 9, of the Constitution, requiring that direct taxes be apportioned, were urged as restricting certain operations of the law with respect to the facts in the cases before the Court, and the Supreme Court sustained the law as against the contentions there urged. In none of them, however, was the present question presented.

In *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, the

question related to the tax on mining corporations, and it was found that the tax there under consideration was not "a tax upon property as such, because of its ownership", but like the tax considered in *Stratton's Independence, Ltd.,* v. *Howbert, supra,* was a "true excise", levied on the results of the business of the corporation, "in carrying on mining operations".

That any attempt under the guise of an income tax law to levy an unapportioned direct tax on real or personal property could not be sustained is evident from the statements in the opinion of the Supreme Court delivered by the Chief Justice in the *Brushaber* case at pages 18, 19:

> "the whole purpose of the amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived . . . it was drawn with the object of maintaining the limitations of the constitution and harmonizing their operation. We say this because it is to be observed that although from the date of the *Hylton* case because of statements made in the opinions in that case it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership, the Amendment contains nothing repudiating or challenging the ruling in the *Pollock* case that the word direct had a broader significance since it embraced also taxes levied directly on personal property because of its ownership, and therefore the amendment at least impliedly makes such wider significance a part of the Constitution—a condition which clearly demonstrates that the purpose was not to change the existing interpreta-

> tion except to the extent necessary to accomplish the result intended, that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself and thereby to take an income tax out of the class of excises, duties, and imposts and place it in the class of direct taxes."

Again, in *Stanton* v. *Baltic Min. Co.*, (*supra*) Mr. Chief Justice White said (p. 113):

> "We are here dealing solely with the restriction imposed by the Sixteenth Amendment on the right to resort to the source whence an income is derived in a case where there is power to tax for the purpose of taking the income tax out of the class of indirect to which it generically belongs and putting it in the class of direct to which it would not otherwise belong in order to subject it to the regulation of apportionment."

Finally, the Court said, referring to the Sixteenth Amendment, "As pointed out in recent decisions, it does not extend the taxing power to new or excepted subjects, but merely removes all occasion, which otherwise might exist, for an apportionment among the States of taxes laid on Income", per Mr. Justice Van Devanter, *Peck* v. *Lowe,* 247 U. S. 165, 172.

See also, *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330, 335.

The doctrine of the *Pollock* case remains the law of the land, except so far as a tax on "income" has

been removed through the Constitutional Amendment from the application of that doctrine.

It is also apparent that there was no intention to authorize Congress to coin at will definitions of "income" and prescribe that something which is not, in any true sense of the word, income shall be income for the purposes of taxation. Congress cannot by legislative fiat put a subject of a tax in a different category from that in which it properly belongs, for that would be to subject the constitutional restrictions to the legislative will.

What constitutes income is exclusively a matter for determination of the courts.

In the present case there is no room for disputing the fact that the tax is levied upon property solely by virtue of its ownership. The Standard Oil Company of California had paid its excise tax under the Corporation Tax Act of 1909 and its income tax under the Income Tax Laws of 1913 and 1916. There is no pretense here that the present tax is laid upon the corporation, or by reason of any privilege or business of the corporation. The tax is levied upon the individual stockholder's income, simply because of his ownership of the stock in question. The tax upon the stock by virtue of the stockholder's ownership is, in the very nature of things, a direct tax which must be apportioned unless it can be said that this stock, issued in the circumstances we have stated, is income within the meaning of the Sixteenth Amendment. It is our contention that it is not.

POINT II.

THE DECISION IN TOWNE v. EISNER, 245 U. S. 418, WAS NOT BASED UPON THE GROUND THAT THE SURPLUS UNDERLYING THE 'STOCK DIVIDEND' WAS ACCUMULATED PRIOR TO MARCH 1, 1913, BUT UPON THE GROUND THAT THE 'STOCK DIVIDEND' WAS ESSENTIALLY NOT INCOME.

In *Towne* v. *Eisner,* the shares of stock constituting the 'stock dividend' were issued in the year 1914 under a corporate resolution adopted in December, 1913. The Supreme Court based its decision squarely upon the proposition that the 'stock dividend' was, in its nature, not income. The ruling did not proceed upon the ground that the surplus, which was subsequently capitalized, had been accumulated before March 1, 1913. It is manifest that the reasoning of the Court would have required exactly the same conclusion if the surplus in that case had been accumulated after March 1, 1913. In delivering the opinion of the Court, Mr. Justice Holmes said (pp. 426-427):

> "Notwithstanding the thoughtful discussion that the case received below we cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman. What was said by this court upon the latter question is equally true for the former. 'A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. . . . The proportional inter-

> est of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones'. *Gibbons* v. *Mahon,* 136 U. S. 549, 559, 560. In short, the corporation is no poorer and the stockholder is no richer than they were before. *Logan County* v. *United States,* 169 U. S. 255, 261. If the plaintiff gained any small advantage by the change, it certainly was not an advantage of $417,450, the sum upon which he was taxed. It is alleged and admitted that he receives no more in the way of dividends and that his old and new certificates together are worth only what the old ones were worth before. If the sum had been carried from surplus to capital account without a corresponding issue of stock certificates, which there was nothing in the nature of things to prevent, we do not suppose that any one would contend that the plaintiff had received an accession to his income. Presumably his certificate would have the same value as before. Again, if certificates for $1,000 par were split up into ten certificates each, for $100, we presume that no one would call the new certificates income. What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new."

This language is unequivocal, but the conclusion to be drawn from it that the decision had been based solely upon the nature of the 'stock dividend' and not upon the time when the surplus was accumulated, is

put beyond any possible question by the later decisions of the Supreme Court.

Thus, in *Lynch* v. *Hornby,* 247 U. S. 339, there had been a distribution of dividends by a lumber company in the year 1914 of which 76 per cent. was derived from conversion into money of property owned by the corporation prior to March 1, 1913. In short, the dividend was an extraordinary one based in very large part upon an accumulated surplus represented in great measure by an appreciation in value of the company's timber lands. The Court held, however, that as the dividends were received in 1914 they were taxable as income under the Federal Income Tax Act, even though "they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing". The Court thus defined its position:

> "Dividends are the appropriate fruit of stock ownership, are commonly reckoned as income, and are expended as such by the stockholder without regard to whether they are declared from the most recent earnings, or from a surplus accumulated from the earnings of the past, or are based upon the increased value of the property of the corporation. The stockholder is, in the ordinary case, a different entity from the corporation, and Congress was at liberty to treat the dividends as coming to him *ab extra,* and as constituting a part of his income when they came to hand" (*id.,* p. 344).

It is thus clearly apparent that had the shares constituting the 'stock dividend' in the *Towne* case been

considered to be income, the fact that they represented a surplus accumulated before March 1, 1913, would not have precluded the imposition of the tax, as that fact did not preclude the imposition of the tax upon the distribution of the surplus so accumulated by the corporation in *Lynch* v. *Hornby*. The distinction was not in the time when the surplus had been accumulated but in the fact that in *Lynch* v. *Hornby* there was actually appropriated to the stockholder through the dividend a certain amount of property, which became the stockholder's individual property and was no longer a contingent interest in corporate assets, while in the *Towne* case there was a mere capitalization of surplus which "took nothing from the property of the corporation and added nothing to the interest of the shareholder".

This was distinctly stated in *Peabody* v. *Eisner,* 247 U. S. 347. In that case, the Union Pacific Railroad Company declared an extra dividend in the year 1914 consisting in part of certain shares of stock of the Baltimore & Ohio Railroad Company, these shares having been owned by the Union Pacific Railroad Company prior to March 1, 1913. The Court held that although the dividend was an extraordinary one and a distribution *in specie* of a portion of the corporate assets, still it was to be considered income and taxable as such. The Court expressly referred to the case of *Towne* v. *Eisner,* and explicitly stated the ground upon which the former decision rested, that is, that it was a 'stock dividend' and not, in its nature, income. The Court, after referring to the ruling in the District Court in the *Towne* case, said:

> "The latter case" (that is, the *Towne* case) "has since been reversed (245 U. S. 418), but

only upon the ground that *it related to a stock dividend which in fact took nothing from the property of the corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented that interest.* . . . In this case" (that is, the *Peabody* case) "the plaintiff in error stands in the position of the ordinary stockholder, whose interest in the accumulated earnings and surplus of the company are not the same before as after the declaration of a dividend; his right being merely to have the assets devoted to the proper business of the corporation and to receive from the current earnings or accumulated surplus such dividends as the directors in their discretion may declare; and without right or power on his part to control that discretion.

"It hardly is necessary to say that this case is not ruled by our decision in *Towne* v. *Eisner,* since the dividend of Baltimore & Ohio shares was *not* a stock dividend but a distribution *in specie* of a portion of the assets of the Union Pacific, and is to be governed for all present purposes by the same rule applicable to the distribution of a like value of money. It is controlled by *Lynch* v. *Hornby,* this day decided, *ante,* 339." (Italics ours.)

The very latest decision of the Supreme Court on this subject (December 9, 1918) shows the Court's firm adherence to the view that where the transaction under consideration makes the tax payer "no richer than before" the Court will hold the new evidence of property principal and not income.

Gulf Oil Corporation v. *Lewellyn, Collector,*
39 Supreme Court Rep. 35.

POINT III.

THERE IS NO BASIS FOR THE CONCLUSION THAT THE WORD 'INCOME' IN THE SIXTEENTH AMENDMENT HAS A BROADER MEANING THAN THE WORD 'INCOME' IN THE INCOME TAX ACT OF 1913 UNDER WHICH THE QUESTION AROSE IN THE TOWNE CASE.

The Income Tax Act of October 3, 1913 (38 Stat. 114) under which the case of *Towne* v. *Eisner* arose, provided as follows:

> "A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon *the entire net income* arising or accruing *from all sources* in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon *the entire net income* from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere.
>
> "Subdivision 2 (providing for the surtax).
>
> . . . . .
>
> "Every person subject to this additional tax shall, for the purpose of its assessment and collection, make a personal return of his *total net income from all sources,* corporate or otherwise, for the preceding calendar year.
>
> . . . . .
>
> "B. That, subject only to such exemption and deductions as are hereinafter allowed, the *net income* of a taxable person shall include

gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, *dividends,* securities, or the transaction of any lawful business carried on for gain or profit, or *gains or profits and income derived from any source whatever,* including the income from but not the value of property acquired by gift, bequest, devise, or descent: . . .

"That in computing net income for the purpose of the normal tax there shall be allowed as deductions: . . . seventh, the amount received as dividends upon the stock or from the net earnings of any corporation, joint stock company, association, or insurance company which is taxable upon its net income as hereinafter provided . . .

. . . . . .

"D. . . . *Provided further,* That persons liable for the normal income tax only, on their own account or in behalf of another, shall not be required to make return of the income derived from dividends on the capital stock or from the net earnings of corporations, joint-stock companies or associations, and insurance companies taxable upon their net income as hereinafter provided."

It is perfectly clear that had the stock dividend in the *Towne* case been considered to be 'income' in its nature, it would have been subject to the surtax under

these provisions of the Act of 1913. The Act reached *"the entire net income"* arising *"from all sources"*. It embraced all *"dividends"* without qualification and *"gains or profits and income derived from any source whatever"*. There is not the slightest ground for the exclusion from these broad descriptive phrases of anything which was in its nature *'income'*, which had accrued during the tax period and which was not excepted by the terms of the Act. It was in this view that the Supreme Court held in *Lynch* v. *Hornby* that the Act reached extraordinary dividends from surplus which had been accumulated before March 1, 1913, even where the surplus embraced the increased value of the property of the corporation. While the distribution was an extraordinary one, it was held to be within the comprehensive words of the Act covering income from all sources. The Supreme Court expressly overruled the contention that the words of the Act of 1913 could be read in connection with the explicit provision of the later Income Tax Act of 1916 so as to exclude dividends declared out of earnings or profits which had accrued prior to March 1, 1913. The later Act of 1916 expressly excluded dividends out of earnings or profits which had accrued before March 1, 1913 (*ante,* p. 4), but the Supreme Court held that no such qualification could be read into the broad words of the Act of 1913 (*Lynch* v. *Hornby,* 247 U. S. 344-345). The only ground for holding the 'stock dividend' in the *Towne* case not to be taxable, although the shares were issued in the year 1914 under a corporate resolution of December, 1913, was that the 'stock dividend' was not income in its *nature*. And this being so, it necessarily

follows that it was just as much excluded from the authority conferred by the Sixteenth Amendment as it was from the provision of the Act of 1913. If Congress had the power to tax the 'stock dividend', because the 'stock dividend' was *income,* there is no escape from the conclusion that it did tax it in the Act of 1913. And, if the 'stock dividend' in the *Towne* case was not within that Act, it was only by virtue of the fact that it was not income in any sense for the purpose of taxation as such.

It in no way militates against this view that a given word may not have the same meaning as used in different statutes or in the Constitution and a statute. As Mr. Justice Holmes said in the *Towne* case, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used". This was said in the *Towne* case in denying the motion to dismiss the writ of error. The Government urged that there was nothing before the Court but the construction of a statute and hence that there was no propriety in a direct writ of error. In short, the motion to dismiss was upon the ground that, as the same word was used in both Constitution and statute, no constitutional question could be involved. The plaintiff in error, however, had contended that if the Act of Congress was construed to authorize a tax upon the 'stock dividend' in question, the Act was unconstitutional. As Mr. Justice Holmes said, the Government had applied the force of the Constitution to the plaintiff upon the assertion that the statute had authorized it to do so, and, of course, the plaintiff in error

was entitled to take his appeal to the Supreme Court, urging that the Act was invalid if it had the meaning for which the Government had contended and which the Court below had assigned to it.

The point of the decision in this aspect was that the fact that the same word as used in both Constitution and statute did not eliminate the constitutional question. The party insisting that he was taxed unconstitutionally through the application of the statute, still had his right to go to the tribunal which, according to the distribution of appellate jurisdiction, was to determine constitutional questions. But the Supreme Court having jurisdiction of the writ of error whatever it might think of the question whether the 'stock dividend' was or was not income, then proceeded to determine the case, not upon the theory of a limited use of the word 'income' in the statute, but with regard to the essential characteristics of the 'stock dividend', holding that it was not income in its nature.

The character of this determination is not to be obscured by the ruling on the question of jurisdiction. Because the same word may be used in different senses in the Constitution and a statute, and thus a constitutional question as well as a question of statutory construction may be involved, it does not follow that the reasoning of the decision on the merits may not be so fundamental and controlling with respect to the meaning of the word as to determine the question of constitutional interpretation. The Supreme Court had jurisdiction to determine the meaning of the word 'income' both as used in the statute and as used in the Constitution, but in determining that the 'stock divi-

dend' did not fall within the description of income, it based its conclusion upon reasoning which had no reference to the special time or circumstance of the statute but to the nature of the property itself, and its conclusion that the 'stock dividend' was not income was thus based upon a ground applicable both to the Constitution and to the statute. In fact the statute was enacted immediately after the Sixteenth Amendment was adopted and manifestly with the same intent.

The truth is that the possible distinction, presented in the *Towne* case, between the meaning of the word 'income' as used in the Constitution, and its meaning as used in the statute, lay in the circumstance that the 'stock dividend' there was based upon a surplus accumulated before the Sixteenth Amendment was adopted, that is, before March 1, 1913. If the Court had considered 'stock dividends' to be income in their nature, and thus within the purview of the Sixteenth Amendment, the Court might then have said that, while this was true, the statute did not intend to embrace dividends derived from corporate accumulations which had accrued before the effective date of the Act. But the Court was of the contrary view. The Court was of the opinion, as shown by its later decisions in *Lynch* v. *Hornby* and *Peabody* v. *Eisner,* that the Act of 1913 did reach dividends subsequently declared, although derived from corporate accumulations antedating March 1, 1913. It was of the view that the Act of 1913 reached dividends thus derived, even though they were extraordinary or distributed corporate assets *in specie.*

The possible distinction with respect to the scope

of the statute was thus eliminated and the Court hence came to deal with the essential quality of 'stock dividends' and with the fundamental and controlling questions whether they were in their nature 'income'. We cannot doubt, said the Court, "that the dividend was capital". And thus, holding that it was 'capital' and not 'income', upon the consideration, not of time, circumstance or limitation peculiarly relating to the statute, but of the nature of the so-called 'stock dividend', that is, of the shares issued, the reasoning of the Court excluded the 'stock dividend', not simply from the operation of the statute, but from that of the constitutional Amendment itself.

For the purpose of reaching property of this sort, whose nature has thus been determined authoritatively, the word 'income' in the Amendment cannot be deemed to be any more effective than the word 'income' as used in the Act of 1913.

POINT IV.

'STOCK DIVIDENDS' ARE NOT INCOME WITHIN THE MEANING OF THE SIXTEENTH AMENDMENT.

A 'stock dividend' is not income to the stockholder receiving it, but is a mere readjustment of the evidence of the stockholder's interest already owned. The 'stock dividend' takes nothing from the property of the corporation and adds nothing to the interests of the stockholders. The only change in substance is that, instead of the property represented thereby being

distributed to stockholders, it is permanently fixed as capital so that it cannot be distributed.

The situation here presented is a typical one and the facts to which the question is addressed are familiar.

A corporation is not bound to distribute all its earnings in dividends. The directors may properly decide to use a portion of the earnings for the development of business, for the extension of plant, for betterments and for working capital. The undivided surplus of a corporation is not, normally, idle money; it is, normally, invested money. It is money invested in property, or embarked in the corporate enterprise; that is the reason it is not paid out in dividends. If the directors have not transcended the broad limits of their judgment, the stockholders cannot complain because earnings are invested instead of being distributed.

The interest of the stockholders, with respect to the property of the corporation, is an interest in the aggregate assets of the company, subject to the payment of debts. It is not an interest in the segregated portion representing the original subscriptions; it is not an interest limited to an amount equal to the par value of their shares; it is not an interest limited to any particular portion of the corporate property, in the absence of special charter provisions, but is simply an interest in all the corporate assets. When these assets are swelled by the addition of undivided profits, the interest of the stockholders in these accumulations is precisely the same as their interest in any other property of the corporation. "The property of every

company may consist of three separate distinct things, which are its capital stock, its surplus, its franchise. But these three things, several in the ownership of the company, are united in the ownership of the shareholders. The share stock covers, embraces, represents all three in their totality, for it is a business photograph of all the corporate possessions and possibilities." (*People ex rel. W. U. T. Co.* v. *Coleman,* 126 N. Y. 433, 438.)

When dividends are declared the amounts of the dividends are separated from the corporate property and are received by the stockholders respectively as their separate property. But until dividends separating money or property from the corporate assets in this way are declared, the stockholders continue to retain the interest in all these assets represented by their stock, the extent and value of their aggregate interests depending not upon the sums originally contributed to capital, but upon the extent and value of all the assets of the corporation, including its accumulations, after deducting liabilities. When a so-called 'stock dividend' is declared, the company does not distribute but continues to hold the property upon which the stock issue rests. Its undivided profits previously invested in the enterprise continue to be so invested. Instead of being a "dividend" in any proper sense, the effect of the action is that there shall be no dividends of the accumulations capitalized. The aggregate interests of the stockholders remain unchanged and their proportional interests remain unchanged.

Thus, a 'stock dividend', or increase of capital stock

against surplus accumulations, accomplishes two things:

(1) The amount represented by the 'stock dividend' is permanently classified so that it cannot be paid out as dividends.

(2) The number of shares is increased without affecting the title of the corporation to any part of the corporate property and without adding to the ratable interests of the stockholders.

Upon a liquidation immediately before the 'stock dividend' the stockholder would have received precisely the same amount as he would have received upon a liquidation immediately after the 'stock dividend'. So far as the paper, or stock certificate, issue is concerned, it is an evidence of an interest already owned and permanently capitalized.

These plain incidents of the transaction have been repeatedly and authoritatively described.

> "The corporate property remains the same after the stock is increased as before and the interest of each stockholder in the corporate property is also unchanged."
>
> *Kaufman* v. *Charlottesville Woolen Mills Co.*, 93 Va. 673, 675.

> "After a stock dividend a corporation has just as much property as it had before . . . after such a dividend the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property of the corporation, and after the dividend

they represent that and no more. A stock dividend does not distribute property, but simply dilutes the shares as they existed before."

Williams v. *Western Union Telegraph Co.*, 93 N. Y. 162, 189.

"There is a clear distinction between the ordinary cash dividend, no matter when earned, and a stock dividend declared as in the case at bar. The one is a disbursement to the stockholder of accumulated earnings, and the corporation at once parts irrevocably with all interest therein. The other involves no disbursement by the corporation. *It parts with nothing to the stockholder.* The latter represents not an actual dividend, but certificates of stock which evidence in a new proportion his interest in the entire capital, including such as by investment of accumulated profits has been added to the original capital."

DeKoven v. *Alsop*, 205 Ill. 309.

"It is the characteristic feature of a stock dividend that the property of the corporation itself remains unchanged, but that each one of the shares of the increased stock represents a smaller fractional interest than before in the total amount of the corporate property. On the other hand, it is the characteristic feature of a dividend declared and paid wholly from the net profits or undivided earnings that it does diminish the property of the corporation by exactly the amount of the dividend so paid out, while it leaves the fractional interest represented by each share of the capital stock exactly where it was before. *Gibbons* v. *Mahon*, 136 U. S. 549, 559, 560."

Gray v. *Hemenway*, 212 Mass. 239.

"The word 'dividends' if unqualified, signifies dividends payable in money. The word 'income' has a broader meaning, but hardly broad enough to include things not separated in some way from the principal. It is not synonymous with 'increases'. The value of stock may be increased by good management, prospects of business, and the like. But such increase is not income. It may also be increased by the accumulation of surplus; but so long as that surplus is retained by the corporation *either as surplus or as increased stock,* it can in no proper sense be called income."

Spooner v. *Phillips,* 62 Conn. 62, 68.

"It is also one of the incidents of a stock dividend that the shareholder who receives his *pro rata* proportion of the new issue, while he acquires the ownership of more shares, adds nothing to his proportionate ownership of the assets of the corporation. His holding, after the new issue, bears precisely the same ratio to the total of the outstanding shares as did his previous holding to the previous total (*Terry* v. *The Eagle Lock Co.,* 47 Conn. 141, 165). The underlying idea of a cash dividend, on the other hand, is the distribution to shareholders as the rewards of the corporate enterprise of a portion of the profits or surplus assets of the corporation. . . . Whatever form the distribution takes, the result always is the reduction of both the corporate assets and surplus by just the amount of the distribution. Something is taken from the corporation and given to the stockholders. All which is distributed becomes released

from all corporate control and goes under the dominion of the share owners."

Green v. *Bissell,* 79 Conn. 547, 551.

See also,

Terry v. *Eagle Lock Co.,* 47 Conn. 141.
Brinley v. *Grou,* 50 Conn. 66.
Bouch v. *Sproule,* 12 App. Cas. 385.
Jones v. *Evans* (1913), 1 Ch. 23.
In re *Carson,* Irish Reports (1915), Vol. I, p. 321.
Guinness, Trustee, v. *Guinness,* Cases Ct. of Session, 5th Series, Vol. 6, p. 104.
Minot v. *Paine,* 99 Mass. 101.
Davis v. *Jackson,* 152 Mass. 58.
D'Ooge v. *Leeds,* 176 Mass. 558.
Hyde v. *Holmes,* 198 Mass. 287.
Brown v. *Larned,* 14 R. I. 371, 373.
Billings v. *Warren,* 216 Ill. 281.
Lancaster v. *Mason,* 152 No. Car. 660.
Great Western Mining & Mfg. Co. v. *Harris,* 128 Fed. 321, 326.

A genuine dividend constitutes a debt between the corporation and the shareholders;[1]* once declared it may not be rescinded [2]* and an action may be brought on the debt.[1]*

It is otherwise with a stock issue made to shareholders (commonly called a 'stock dividend'), for, as the directors do not divide anything and in substance

[1]* *King* v. *Paterson,* 29 N. J. L. 504; *Hunt* v. *O'Shea,* 69 N. H. 600; *Lockhart* v. *Van Alstyne,* 31 Mich. 76; *Stoddard* v. *The Shetucket Foundry Co.,* 34 Conn. 542.

[2]* *Wheeler Beers & Others* v. *The Bridgeport Spring Co.,* 42 Conn. 17; *Staats* v. *Biograph Co.,* 236 Fed. 454.

merely readjust the symbols by which the shareholders own the net assets, they may recall their own action and leave the shareholders without grievance.

In *Staats v. Biograph Co.*, 236 Fed. 454, the Circuit Court of Appeals for the Second Circuit, holding that the action of a board of directors in declaring a 'stock dividend' might be rescinded, said (p. 457):

> "In this case it does not escape observation that the plaintiff's right to a stock dividend, if he has such a right and can enforce it, would gain him nothing. We say it would gain him nothing, because while a stock dividend would increase the number of his shares, it proportionately diminishes the value of each of his shares, leaving the aggregate value as it was before. He acquires the ownership of more shares but he adds nothing to his proportionate ownership of the assets of the corporation."

The question of the nature of a 'stock dividend' was considered by the Supreme Court in the leading case of *Gibbons v. Mahon*, 136 U. S. 549, where it was decided that it is in its nature capital and not income.

That was a case of a will bequeathing stock in a corporation and government bonds in trust to pay "the dividends on said stock and the interest on said bonds as they accrue" to a daughter of the testator, and directing that upon her death "the said stock, bonds, and income shall revert to the estate of the trustee." The corporation accumulated earnings from time to time, before and after the death of the testator, which were invested in its permanent works and plant. It declared a 'stock dividend' representing these accumu-

lated earnings and the question was whether this 'stock dividend' was income. It was held to be capital and that it should go to the remainderman, only the dividends which might be received on such stock being payable to the tenant for life.

After reviewing the authorities of other jurisdictions, Mr. Justice Gray discussed the nature of a 'stock dividend';

> "Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholder, unless and until it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of its business, or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years; or it may retain portions of its earnings and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property" (p. 588).
>
> "When a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital, or a division of profits and income, depends upon the substance and intent of the action of the corporation, as manifested by its vote or resolution; and ordinarily a dividend declared in stock is to be deemed capital, and

a dividend in money is to be deemed income, of each share."

"A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein, of all the shareholders are represented by the whole number of shares; and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones" (pp. 559-60).

"The resolution is clearly an apportionment of the new shares as representing capital, and not a distribution or division of income. As well observed by Mr. Justice James, delivering the opinion of the Court below: 'Certificates of stock are simply the representative of the interest which the stockholder has in the capital of the corporation. Before the issue of these two hundred and eighty new shares, this trustee held precisely the same interest in this increased plant in the capital of the corporation that she held afterwards. She merely had a new representative of an interest that she already owned, and which was not increased by the issue of the new shares. A dividend is something with which the corporation parts, but it parted with nothing in issuing this new stock. It simply gave a new evidence of own-

> ership which already existed. They were not in any sense, therefore, dividends for which this trustee had to account to the *cestui que trust*. She stood after the issue of the new shares just as she had stood before; and the trustee was obliged to treat them just as she did, namely, as a part of the original, and to pay the dividends to the *cestui que trust*' " (p. 569).

Gibbons v. Mahon was long held under advisement by the Court, and it is apparent that it was decided after the most thorough consideration. We have quoted at length from the opinion, because the *ratio decidendi* renders unavailing the efforts which have been made to distinguish this case. The Court explicitly rests its decision upon *the essential nature* of the transaction—that is, upon a consideration of the essential quality of a 'stock dividend' based there, as here, on accumulated surplus invested in plant and property and by appropriate resolution permanently classified as capital. The opinion makes it clear that it was not a rule particularly applicable to wills, or trusts, but the nature and effect of the corporate action which determined the conclusion of the Court. If the 'stock dividend' was not receivable as income, when if income the claimant would have been entitled to receive it, it could hardly be said that it should be taxed as income. Had it been income, the *cestui que trust* would have succeeded, but because the Court considered it *not* to be income she lost her suit. If the 'stock dividend' was not income for the purpose of distribution to the beneficiary of the income, we cannot con-

ceive that it could have been regarded, had an income tax law been in operation, as income for the purpose of taxing it.

Gibbons v. *Mahon* was an exposition by which the final authority defined to this extent, by exclusion, the meaning of "income". The usual rule is that when a word which has received judicial construction is subsequently used in Federal legislation it should be presumed to have been used in the sense determined by the Court (*Kepner* v. *United States,* 195 U. S. 100, 124; *Latimer* v. *United States,* 223 U. S. 501, 504). And this principle, it is submitted, should be applied in the construction of the Sixteenth Amendment. Authoritative judicial decision is our glossary of terms used in statutes and constitutions; and it was this exposition of the meaning of 'income' in *Gibbons* v. *Mahon* which the court adopted, without qualification, in *Towne* v. *Eisner,* 245 U. S. 418.

We are concerned here with the *property interest* represented by the stock in question upon which the plaintiff had been taxed. This stock represents (1) the right to have the corporate property managed according to the fundamental compact or contract of membership; (2) the right to receive dividends, when duly declared, that is, amounts separated from the corporate assets and vested in the stockholders individually; and, (3) the ratable interest in the aggregate of the corporate assets to which the stockholders would be entitled upon liquidation.

With respect to management, the stockholder's rights are unchanged save to the extent that the accumulated surplus, which is represented by the new

stock, is no longer subject to the discretion of the directors in distribution but is classified as capital and must be retained by the corporation as such.

With respect to dividends that may be declared upon this stock,—whenever any such dividend is declared and there is thus segregated from the corporate property an amount which the stockholder receives, he will be taxable accordingly.

It is argued that the effect is the same as though a cash dividend had been declared, and its amount received by the plaintiff, and she had then invested this amount in the new stock. The same argument was made unavailingly in *Towne* v. *Eisner*. It is manifest that the two things mentioned, instead of being the same, are different, both legally and practically. When the cash dividend is declared and the amount is received, the stockholder obtains something which he owns and which he may reinvest or not as he pleases. He receives property in his exclusive ownership, and he exercises the freedom of choice. In the case of a 'stock dividend', he obtains nothing but an evidence of what he already owns; he has no freedom to invest or not invest; and the investment is permanently capitalized. This distinction was pointed out in *Davis* v. *Jackson*, 152 Mass. 58.

It is argued further that the certainty that these earnings of the corporation could thenceforth never be distributed as dividends, was a valuable assurance of the continued solvency of the company to the stockholder, and that this assurance was subject to a tax as income of the individual stockholder. But before the 'stock dividend' the stockholder's interest in the

corporate assets could not be taken away, except through mismanagement or losses, and his interest continues to be subject to these contingencies as before. Previously, if there were distribution in cash, he would receive his dividend and own the amount. The proposition that the certainty that a man will never receive a given fund is equivalent to his actual receipt of that fund will appeal less to the shareholder's sense of logic than to his sense of humor.

The argument that a 'stock dividend' is income fails to distinguish between the effect of the dollar sign printed on the certificates of stock as indicating the amount contributed to "capital", and the interest of the stockholder in the aggregate corporate assets, with which this dollar sign, or the par value of his shares, has nothing to do. As to the corporation, its net assets are divided into two groups, "capital" and "surplus", with different legal attributes, and the dividing line between the two groups is shown by the nominal or par value of the company's stock, or the amount of the contributed "capital".

In the case at bar, for example, The Standard Oil Company of California had $49,686,656 of capital stock, and $94,538,919. of assets. The $49,686,656 of capital was divided into 496,866 shares of the par value of $100. each. These $49,686,656 represented, in a general sense, a trust fund to be used by the corporation in the conduct of its business and for the payment of its debts; none of it could lawfully be separated from the company and paid to its stockholders. The other $44,852,263. of its assets represented surplus which the company was free to dispose of in any

manner that it saw fit. There were 496,866 shares of stock outstanding; the dollar mark on each certificate, indicating the par value of each share, was of importance in indicating the amount of the contributed capital stock, and therefore the dividing line between these two groups of its net assets.

But there was no such distinction with regard to the stockholder's interest in the aggregate corporate assets. As to this the dollar mark on his certificate was immaterial. Each share of stock represented 1/496,866 part of the net assets of the corporation, and those assets might amount to $1,000,000. or $50,000,000, and this was true whether his stock had a nominal par value or whether, as is permitted in various States, it was "no par value" stock.

When it is argued that in receiving a 'stock dividend', a stockholder receives from the corporation something of value which must therefore be income, there is an inaccuracy in terms. If I exchange a two-dollar bill with the money changer for two one-dollar bills, I have, it is true, received from him something of value, but my property interest remains entirely unchanged, and I have surely not received any "income".

If the Standard Oil Company of California had outstanding 496,866 shares of capital stock of the nominal or par value of $100. each, and had issued in exchange therefor 993,732 shares of the nominal or par value of $50. each, each stockholder would have received an increased number of tangible evidences of his ownership in the assets of the corporation. He would have no greater interest in the assets of the cor-

poration than he had before, and the dividends he might thereafter receive on his holdings of $50. shares would be just as large as if he received dividends on his original $100. holdings. But the Government would not contend that such an alteration of the stockholder's certificates constituted income.

It undoubtedly will be conceded by the Government that if a corporation having a million dollars of capital and with no surplus, waters its stock and issues a 50 per cent. 'stock dividend' to its stockholders, the new stock, not representing an increase of assets, would not constitute taxable income in the hands of the shareholder; the receipt by the stockholder of certificates of stock having an increased nominal or par value does not increase the stockholder's real interest in the corporation, and therefore the change does not constitute income.

The effect of this concession cannot be overcome. It is conceded that the increase of the number of shares into which the assets of the corporation are divided, or the issue of a new series of fractional certificates, does not constitute income to the stockholder if the corporation has no accumulated surplus, even though the nominal or par value of the shares of stock owned by each stockholder is thereby increased. It is conceded that mere increase in the number of shares into which the capital of a corporation is divided does not constitute income, and this regardless of the question whether the corporation has available accumulated surplus or not. And it is just as true that the stockholder's interest in the aggregate corporate assets remains unchanged when there is an increase

of stock based on accumulated surplus. The change is simply that the amount is permanently capitalized so that it cannot be distributed without liquidation; on liquidation the stockholder would receive no more than before.

Of course the salability of the new shares presents no more argument for the existence of "income" than does the salability of the old shares at an increased price because of the accumulated earnings back of them. A sale in either case would have the same effect.

If one had 9,000 shares previously, and received 4,500 additional shares through a 'stock dividend' based on surplus accumulations, he of course, could sell any portion of the total 13,500 shares. And if he sold 4,500 of the 13,500 shares he would receive the equivalent in cash. But he could have realized the same amount prior to the 'stock dividend' by selling 3,000 shares of his original 9,000 shares. His intrinsic interest is the same, and the transaction has not affected its value.

It is evident that Congress has suffered from "polarization" of words as Judge Dickinson put it in *Penn. Mutual Life Ins. Co.* v. *Lederer* (D. C. E. D. Pa. Feb. 4, 1918) 247 Fed. 559, under the 1913 law.

> "As readers and hearers we should be ever on guard to prevent our minds playing any tricks upon us by being affected by what a famous writer has happily called the 'polarization' of words. The word 'dividends' partakes somewhat of the character of such words. To

the ears of those fortunate enough to be placed within hearing distance of the word, it has a pleasant sound suggestive of the 'cutting of a ripe melon'. It means a share of profits. . . . Such 'dividends' mean merely the distribution of the whole or part of the 'net income' to the happy individuals who have a right to share in it.

As a consequence, counsel for defendant manifest an inclination to dwell upon the word 'dividend', and to speak of what policy holders receive as a 'dividend'. Counsel for plaintiff show a tendency to avoid the use of the term, or, when they do employ it, they are fond of qualifying it by a slighting phrase. It is a 'so-called' dividend. We do not share either in this fondness for or aversion to the use of the word. *It is clear that the profit-sharing thought is altogether an applied meaning, which the word at times properly has. It may, however, be properly employed when the thought of profit is wholly absent,* and the word has its etymological meaning of a unit portion of something which has been divided."

The Courts have always recommended that mere appreciation in value of capital assets is not to be called income.

"The mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of the tax on the amount of the advance. Mere advance in value in no sense constitutes the gains, profits, or income specified by the statute. It

> constituted and can be treated merely as increase of capital."
>
> *Gray* v. *Darlington,* 15 Wall. 63, 66.*

In the words of Mr. Justice McKenna in *Lynch* v. *Turrish,* 247 U. S. 221, 231, speaking with approval of *Gray* v. *Darlington:*

> "Indeed, the case decides that such advance in value is not income at all, but merely increase of capital and not subject to a tax as income."

In the case of the *Baldwin Locomotive Works* v. *McCoach* (3 C. C. A. 1915), 221 Fed. 59, which arose under the Corporation Tax Law of 1909, which measured the tax by the income of the corporation, the Court said:

> "We agree with the District Court that this increase of valuation was not income within the meaning of the statute. Nothing whatever was added to the corporate property, which remained exactly the same after the appraisement as before. The only thing done was to put upon the company's books an expert opinion that certain property was worth a certain sum, and this can hardly be said to be income, or even gain, in any proper sense. The company

*Under the British Income Tax Act (16 & 17 Vict. c. 34) it is established that appreciations in value of capital assets, even after the realization of profits by sale, do not constitute taxable income except in cases of transactions by dealers or other persons who buy and sell for purposes of profits. *Tebrau (Johore) Rubber Syndicate, Limited,* v. *Farmer,* S. T., 5 Income Tax Cases, 658; *Stevens* v. *The Hudson's Bay Company,* 5 Income Tax Cases, 424; *The Assets Company, Lts.* v. *The Inland Revenue,* Cases in the Court of Session, 4th Series, Vol. 24, p. 578.

> could not become either richer or poorer by making a few book entries that merely recorded a new estimate of how much it was worth."

Exactly the same situation is presented when the market value of a share of stock increases because of accumulated earnings. Until *separation* takes place, which happens when a cash dividend is declared, there is no taxable income. Again the courts have recognized that such appreciation is not income, for nothing has come in, part of which can be taken by the government for revenue purposes.

In *Lynch* v. *Hornby,* 247 U. S. 339, the Supreme Court said, through Mr. Justice Pitney, in reference to the undivided surplus:

> "As to these, however, just as we deem the legislative intent manifest to tax the stockholder with respect to such accumulations only if and when, and to the extent that, *his interest in them comes to fruition as income,* that is, in dividends declared" (p. 343).

Finally, the same reason exists for holding that 'stock dividends' shall not be included within the term "income". It is not necessary to show again what happened when the Standard Oil Company of California declared its 'stock dividend', it is merely sufficient to show that plaintiff has not received anything with which to pay the tax. She has received new shares but her old shares represented precisely the same value; in fact she is no richer at the end of the year than at the beginning; and as in all the cases discussed above, the one thing necessary has not taken place—realiza-

tion of gain. She may never realize any gain. Whether she does or not will depend on the ultimate liquidation so far as the shares themselves are concerned. If dividends are received *on* the new shares, so that she does receive gain in this way, she will be taxable on such dividends. But until that point is reached the plaintiff is immune from taxation under an income tax law. She objects to the payment of a tax as having received some income when just the opposite thing has happened—she has been definitely assured that she will not receive it.

It is submitted therefore that when Congress was authorized to tax "incomes" it was not the intention to allow it to tax a change in the evidence of ownership which is all that a 'stock dividend' represents.

POINT V.

JUDGMENT SHOULD BE RENDERED OVERRULING THE DEMURRER AND AWARDING TO THE PLAINTIFF THE SUM SUED FOR.

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